

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
FCC Seeks Comment on Adopting)	
Egregious Cases Policy)	GN Docket No. 13-86
)	

**JOINT REPLY COMMENTS OF THE
NORTH CAROLINA ASSOCIATION OF BROADCASTERS,
THE OHIO ASSOCIATION OF BROADCASTERS, AND
THE VIRGINIA ASSOCIATION OF BROADCASTERS**

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August 2, 2013

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The North Carolina Association of Broadcasters (“NCAB”), the Ohio Association of Broadcasters (“OAB”), and the Virginia Association of Broadcasters (“VAB”) (collectively, the “Associations”),¹ through their attorneys, hereby jointly reply to comments submitted in response to the Commission’s Public Notice seeking comment on adopting an “egregious” cases policy, DA 13-581, (the “Public Notice”)² in the above-captioned proceeding relating to the Commission’s indecency enforcement policy.

¹ The Associations are trade associations representing the interests of broadcasters in their respective states.

² See *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, 28 FCC Rcd 4082 (Apr. 1, 2013).

I. The Commission Must Not Exceed The Constitutional Limits Of *Pacifica* In Indecency Enforcement Against Broadcasters

The Associations agree with the positions of other commenting parties that the Commission's indecency enforcement policies must not breach the outer limits of constitutional regulation established by the Supreme Court in *FCC v. Pacifica Foundation*.³ That means the *furthest* the Commission may reach in its enforcement regime will be to censor "broadcast indecency akin to the 'verbal shock treatment' administered by the Carlin monologue" in *Pacifica*.⁴ Stated another way, the Associations agree with other commenters that the Commission should return to pre-2004 enforcement policies that punish only extreme instances of "deliberate and repetitive use in a patently offensive manner" and certainly will not punish isolated, occasional, unexpected, and otherwise "fleeting" expletives.⁵

The ABC Television Affiliates Association correctly notes in its Reply Comments that "the expansive indecency enforcement regime ushered in by the *Golden Globes Order* ignores the unmistakable limits of *Pacifica*: The Constitution permits Commission regulation of broadcast indecency in only the narrowest of circumstances, leaving all

³ See, e.g., Comments of the National Association of Broadcasters pp. 12-16 (filed June 19, 2013) [hereinafter "Comments of NAB"] (citing throughout to *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)); Reply Comments of the ABC Television Affiliates Association pp. 2-5 (filed August 2, 2013) [hereinafter "Reply Comments of ABC Affiliates"]; Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. pp. 10-11, 19-22 (filed June 19, 2013); Comments of CBS Television Network Affiliates Association and NBC Television Affiliates pp. 4-6 (filed June 19, 2013).

⁴ Reply Comments of ABC Affiliates p. 4; see *id.* pp. 2-5.

⁵ See, e.g., Reply Comments of ABC Affiliates p. 2 ("The Commission's post-*Golden Globes* indecency enforcement policy, which punishes the utterance of even fleeting expletives and momentary, non-sexual nudity, exceeds the limits defined by *Pacifica* and must be corrected."); Joint Comments of Radio and Television Broadcasters Emmis Communications Corporation, Mission Broadcasting, Inc., New Vision Television, Nexstar Broadcasting, Inc., Radio One, Inc. p.10 (filed June 19, 2013) [hereinafter "Joint Comments of Emmis et al."].

indecent speech *other than* the sort of ‘verbal shock treatment’ at issue in that case fully protected against regulation.”⁶ As a threshold matter, actionable content must “describe or depict sexual or excretory organs or activities” to satisfy the Commission’s own definition of indecency.⁷ And as NAB and other commenters have shown, a return to an enforcement policy defined and limited by the *Pacifica* standard of deliberate repetition would help to restore the critical certainty and predictability necessary to protect broadcasters’ constitutional freedoms. Other commenters have persuasively demonstrated, and the Associations agree, that the Constitution requires the Commission’s indecency enforcement policies to be clear, consistent, predictable, and to avoid unnecessary disruption to the editorial judgments of broadcasters.⁸

Other commenting parties have observed that *Pacifica* does not sanction—and the First Amendment does not permit—an enforcement regime that punishes any other categories of protected speech, including “fleeting” expletives or brief glimpses of non-sexual nudity.⁹ In this regard, the Associations agree with NAB’s observation that “the

⁶ Reply Comments of ABC Affiliates pp. 4-5.

⁷ *Id.* p. 8 (citing *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001), ¶ 7); *see also* Comments of NAB p. 26; Comments of ABC, Inc. pp. 30-31 (filed June 19, 2013).

⁸ NAB correctly observes that “Following *Golden Globe*, the Commission has delved entirely too deeply into editorial and artistic judgments that must be left to the discretion of broadcasters and program creators. As the Supreme Court has stressed, such judgments constitutionally are for ‘individual[s] to make, not for the Government to decree.’” Comments of NAB p. 20; *see also* Comments of ABC, Inc. pp. 29-30; Reply Comments of ABC Affiliates pp. 5-6.

⁹ *See* Reply Comments of ABC Affiliates pp. 3-4 (explaining that *Pacifica* makes clear that the First Amendment does not permit the Commission to regulate fleeting language or nudity); *see also* Comments of NAB pp. 12-13, 28; Comments of ABC, Inc. pp. 14, 24-25.

Commission's stricter new policy cannot be reconciled with the narrow, restrained and cautious approach upheld by the Supreme Court in *Pacifica*. It must be jettisoned.”¹⁰

Accordingly, the Associations add their voices to the numerous commenters who insist that the Commission must 1) return to a restrained indecency enforcement regime that reaches no further than the limits of *Pacifica* and, as part of that regime, 2) exempt fleeting expletives and momentary, non-sexual nudity from regulation.¹¹

II. The Commission Must Ensure Fairness By Adopting Enforcement Practices With Definitional Certainty

The Associations agree with other commenters that the Commission must ensure that its enforcement policies are clear, certain, and consistent to provide notice and ensure fairness to broadcasters.¹² As one commenter observed, only by incorporating “essential procedural protections into the indecency enforcement regime can the Commission ensure that broadcasters’ core First Amendment rights are not unnecessarily encroached upon.”¹³ It is essential that the Commission implement well-defined, predictable standards, such as the *Pacifica* “shock treatment” discussed above and familiar to broadcasters for more than 30 years.¹⁴ By contrast, subjective standards are unpredictable and fundamentally unfair because they do not provide notice to

¹⁰ See Comments of NAB p. 16.

¹¹ Reply Comments of ABC Affiliates p. 6.

¹² See, e.g., *id.* p. 5; Comments of NAB p. 28-35.

¹³ Reply Comments of ABC Affiliates p. 6.

¹⁴ Here, too, the Associations emphasize the importance of adhering to constitutional and Commission limits on what constitutes actionable indecency. The threshold definition set out by the FCC, consistent with *Pacifica*, requires that the “material must describe or depict sexual or excretory organs or activities.”

broadcasters of what will be considered actionably indecent.¹⁵ Moreover, the Commission's policies must be applied consistently to ensure fairness to broadcasters and avoid unnecessary disruption to broadcasters' editorial discretion¹⁶.

As a procedural matter, the Commission must also ensure that complaints are appropriately and efficiently resolved. The Associations agree with NAB's proposal that "the Commission should pursue only those complaints 1) submitted by a complainant who actually watched/listened to the programming at issue; and 2) that present sufficient information and supporting documentation as to the particular station concerned, the specific material aired and the time the program aired."¹⁷

Only such facially valid complaints should initiate Commission review and investigation, which should in turn be processed within a reasonable and predictable time frame.¹⁸ As observed by numerous commenting parties, the consequences for latent indecency complaints can be dire for broadcasters, even holding up license renewal applications for multiple terms because of unresolved complaints.¹⁹ Other commenters have shown the magnitude of these consequences, worst of all even for complaints that may or may not be actionable.²⁰ Accordingly, the Commission's enforcement scheme

¹⁵ See Comments of ABC, Inc. pp. 11, 16.

¹⁶ See Comments of NAB pp. 20-22.

¹⁷ See *id.* pp. 34-35; see also Reply Comments of ABC Affiliates p. 7.

¹⁸ See *id.*; Joint Comments of Emmis et al. pp. 14-15.

¹⁹ See Comments of NAB pp. 23-25, 35-37; Reply Comments of ABC Affiliates pp. 8-9; Comments of Emmis et al. pp. 9-10.

²⁰ See, e.g., *id.* For example, other commenters also warn of the chilling effect on broadcaster speech for lack of certainty about what will be held to be indecent. *E.g.*, Joint Comments of Emmis et al. p. 10 ("The result is *de facto* censorship of speech that is clearly protected, a result clearly proscribed by the First Amendment. . . . [T]he FCC must provide broadcasters with much-needed clarity before it resumes its indecency enforcement efforts, and can apply its new policy to broadcasts aired *after* it clarifies what that policy is.")

must be designed for efficient and timely resolution as a matter of procedural fairness to broadcast licensees.

The Associations also agree with the procedural proposals of other commenters that urge the Commission to implement an exemption from indecency enforcement for all news, sports, public affairs programming, and other live programming, to protect against chilling the speech of broadcasters who serve the public interest by providing this important up-to-the-minute content.²¹

III. The Commission Should Not Introduce Further Uncertainty By Adopting A New And Indefinite “Egregious” Standard Going Forward

The Public Notice seeks comment on adopting the current interim standard of “egregiousness.”²² Certain commenting parties have correctly observed that this adjective alone is not sufficiently clear to provide fair notice to broadcasters of the Commission’s enforcement policies.²³ As NAB urges, “In revising its indecency standards, the Commission must use language that is as precise as possible and provide relevant examples and context in its policies and decisions.”²⁴ Although the Associations may agree with the substance of the standard intended by the Commission, it is impossible for the Associations to know what this standard means without clarification

²¹ Comments of ABC Affiliates pp. 6-7; *see also* Comments of ABC, Inc. pp. 25-30.

²² *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, 28 FCC Rcd 4082 (Apr. 1, 2013).

²³ *See, e.g.*, Comments of NAB p. 29; Joint Comments of Emmis et al. pp. 2, 8-9 (“The FCC has not defined the term ‘egregious,’ leaving broadcasters with no guidance as to what the Commission will deem to be of such flagrant, blatant, and glaring offensiveness to be deemed egregious. Indeed, to Joint Commenters’ knowledge, ‘egregious’ has been used only once before with respect to indecency . . . [The policy] is not at all clear.”)

²⁴ Comments of NAB p. ii; *see also id.* p. 29.

and elaboration.²⁵ As it is, the Associations would have to speculate about the meaning of this new standard to comment on its substance and, more importantly, broadcasters would have to speculate about its meaning in order to comply with its demands.

Without examples or context, an “egregious” standard is ripe for subjective interpretation and definitional uncertainty, which threatens fundamental unfairness to broadcasters for the reasons discussed above.²⁶ Even if the term is intended to be consistent with the standard expounded by *Pacifica*, the definitional uncertainty of an “egregious” standard presents a procedural problem that will not permit efficient and fair enforcement.²⁷ The Associations agree that “an ‘egregious cases policy’ would . . . exacerbate the defects in the current enforcement policy, which is already riddled with vagueness and inconsistency.”²⁸ Broadcasters must know in advance what is expected of them, and the Commission should be reluctant to adopt a new standard that

²⁵ See Joint Comments of Emmis et al. p. 3 (“The *Public Notice* refers generally to the FCC’s ‘current’ policy regarding indecency, but neither that document nor any other pronouncement by the agency clearly explains just what the Commission believes its current indecency policy is.”).

²⁶ ABC, Inc. also observes in its opening comments that “. . . the brief Notice did not attempt to define or explain what it meant by ‘egregious’ or exactly how an ‘egregious cases policy’ would differ from the Commission’s recent enforcement standards and practices. In our view, simply adding another subjective and conclusory term like ‘egregious’ into the mix. . . would not . . . provide meaningful clarity and notice to broadcasters of what the Commission might from time to time view as crossing the line. With potentially millions of dollars in fines at stake, a term like ‘egregious’ provides neither guidance nor comfort.” Comments of ABC, Inc. pp. 17-18.

²⁷ See Reply Comments of ABC Affiliates p. 9 (“ABC Affiliates submit that “egregiousness” is far too uncertain and subjective a standard for measuring indecency, particularly when the Commission has not even attempted to define the inherently open-ended term in a way that would provide meaningful guidance to broadcasters.”)

²⁸ *Id.* pp. 9-10.

portends uncertainty and inconsistent application.²⁹ The Associations agree with other commenters that a new “egregious” standard should not be adopted going forward.

Conclusion

For the reasons discussed in these Reply Comments, the Commission should decline to adopt indecency enforcement policies that exceed the constitutional constraints defined in *Pacifica*. The Associations agree with other commenters that the Commission must also ensure fairness to broadcasters by seeking clarity and certainty in its policies and by implementing procedural measures for consistent and efficient resolution of its enforcement efforts. The Associations urge the Commission to abandon divergent and uncertain standards of indecency enforcement, including any new policy defined by the word “egregious,” and to return to a more certain and limited regulatory scheme.

²⁹ See Joint Comments of Emmis et al. p. 8; see also Comments of ABC, Inc. pp. 11-18.

Respectfully submitted,

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